HONG KIM SIME

v.

MALAYAN BANKING BHD. & 2 OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
TAN SRI DATO' LAMIN MOHD YUNUS PCA
DATO' MAHADEV SHANKAR JCA
DATO' AHMAD FAIRUZ DATO' SHEIKH ABDUL HALIM JCA
[CIVIL APPEAL NO: S-02-13-1994]
10 MAY 1996

CIVIL PROCEDURE: *Oaths and affirmations - Justices of the Peace - Authority to administer oath - Whether under any written law - Whether as a Second Class Magistrate - Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2.*

BANKRUPTCY: *Creditor's petition - Affirmation of statements - Whether Justice of the Peace authorised to administer oath - Whether s. 128 of Bankruptcy Act 1967 complied with.*

BANKRUPTCY: *Bankruptcy notice - Number - Different number assigned to corresponding petition - Whether r. 9 of Bankruptcy Rules 1969 complied with - Whether a formal defect - Whether proceedings invalidated - Bankruptcy Act 1967, s. 131.*

WORDS & PHRASES: *"Any written law" - Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990, reg. 2*

In 1988, the respondent herein (the petitioning creditor in the Court below), had obtained judgment against the three appellants herein (the judgment debtors in the Court below). The appellants, however, did not satisfy the judgment debt, and the respondent brought bankruptcy proceedings against them individually. In 1993, the respondent issued bankruptcy notices against the appellants. Subsequently, the respondent took out creditor's petitions and affirmed the truth of the statements contained therein before a Justice of the Peace. The appellants then filed notices to oppose the creditor's petitions on the grounds that: (i) the Justice of the Peace was not authorised to administer the oath due to non-compliance with s. 128 of the Bankruptcy Act 1967 ('the Act'); and (ii) there was non-compliance with r. 9 of the Bankruptcy Rules 1969 ('the Rules') in that the particular numbers assigned by the Registry to the said bankruptcy notices were not assigned to the corresponding creditor's petitions which had actually been given different numbers. The appellants' objection was dismissed by the High Court and they appealed.

Held:

Per Mahadev Shankar JCA (delivering the judgment of the Court):

[1] The effect of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 is that, in Sabah, every Justice of the Peace "shall be authorised and is required to administer oaths under any written law ... as though he were a Second Class Magistrate."

[1b] The phrase "any written law" must necessarily include the Bankruptcy Act 1967.

[2] The use or assignment of different numbers in respect of the said bankruptcy notices and the corresponding creditor's petitions was purely a formal defect; s. 131 of the Act clearly provides that it should not invalidate the proceedings.

[3] The instant appeals were misconceived. This was because the said creditor's petitions had already been struck out in the Court below in compliance with a condition imposed by the appellants.

[Appellants' appeals dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Sumpah dan pengikraran - Jaksa Pendamai - Kuasa untuk mentadbirkan sumpah - Samada tertakluk di bawah mana-mana undang-undang bertulis - Samada sebagai Majistret Kelas Dua - Peraturan Mahkamah Rendah (Kuasa-kuasa Jaksa Pendamai) (Sabah) 1990, k. 2.*

KEBANKRAPAN: *Petisyen pemiutang - Pengikraran pernyataan-pernyataan - Samada Jaksa Pendamai diberi kuasa untuk mentadbirkan sumpah - Samada s. 128 Akta Kebankrapan 1967 telah dipatuhi.*

KEBANKRAPAN: *Notis kebankrapan - Nombor yang berlainan telah diberikan kepada petisyen - Samada k. 9 Kaedah-kaedah Kebankrapan 1969 telah dipatuhi - Samada merupakan ketidak-sempurnaan yang rasmi - Samada prosiding dijadikan tak sah - Akta Kebankrapan 1967, s. 131.*

PERKATAAN & UNGKAPAN: *"Mana-mana undang-undang bertulis" Peraturan Mahkamah Rendah (Kuasa-kuasa Jaksa Pendamai) (Sabah) 1990, k. 2*

Dalam tahun 1988, responden di sini (yang merupakan pemiutang mempetisyen dalam Mahkamah di bawah), telah mendapatkan penghakiman terhadap ketiga-tiga perayu di sini (yang merupakan penghutang penghakiman dalam Mahkamah di bawah). Perayu-perayu tersebut namun begitu, tidak menyelesaikan hutang penghakiman itu, dan responden telah memulakan prosiding kebankrapan terhadap mereka secara individu. Dalam tahun 1993, responden telah mengeluarkan notis-notis kebankrapan terhadap perayu-perayu tersebut. Kemudiannya, responden telah mengeluarkan petisyen-petisyen pemiutang dan mengikrarkan kebenaran penyataan-penyataan yang terkandung di dalamnya di hadapan seorang Jaksa Pendamai. Perayu-perayu kemudiannya telah memfailkan notis untuk membantah petisyen-petisyen pemiutang tersebut atas alasan bahawa: (i) Jaksa Pendamai tersebut tidak diberi kuasa untuk mentadbirkan sumpah tersebut disebabkan ketidak-patuhan s. 128 Akta Kebankrapan 1967 ('Akta tersebut'); dan (ii) terdapat juga ketidak-patuhan k. 9 Kaedah-kaedah Kebankrapan 1969 ('Kaedah-kaedah tersebut'), iaitu nombor-nombor khusus yang ditetapkan oleh Pejabat Pendaftar kepada notis-notis kebankrapan tersebut telah tidak ditetapkan pada petisyen-petisyen pemiutang bersama yang mana telah sebenarnya diberikan nombor-nombor yang berlainan. Bantahan perayu tersebut telah ditolak oleh Mahkamah Tinggi dan mereka telah merayui.

Diputuskan:

Oleh Mahadev Shankar HMR (menyampaikan penghakiman Mahkamah):

[1] Kesan kaedah 2 Peraturan-peraturan Mahkamah Rendah (Kuasa-kuasa Jaksa Pendamai) (Sabah) 1990 adalah bahawa, di Sabah, setiap seorang Jaksa Pendamai "akan diberi kuasa dan dikehendaki untuk mentadbirkan sumpah di bawah mana-mana undang-undang bertulis ... seolah-olah beliau adalah seorang Majistret Kelas Dua.

[1b] Ungkapan "mana-mana undang-undang bertulis" mestilah termasuk Akta Kebankrapan 1967.

[2] Penggunaan atau penetapan nombor-nombor yang berlainan berhubung dengan notis-notis kebankrapan dan petisyen-petisyen pemiutang yang sama hanyalah suatu ketidak-sempurnaan yang rasmi; s. 131 Akta tersebut jelas memperuntukkan bahawa ianya tidak seharusnya mentaksahkan prosiding tersebut.

[3] Rayuan semasa ini telah disalah-tafsirkan. Ini adalah kerana petisyen pemiutang tersebut telah pun dibatalkan dalam Mahkamah di bawah dalam mematuhi syarat yang telah dikenakan oleh perayu-perayu tersebut.

[Rayuan perayu-perayu ditolak]

Legislation referred to:
Bankruptcy Act 1967, ss. 128, 131
Bankruptcy Rules 1969, r. 9
Subordinate Courts (Powers of Justice of the Peace) (Sabah) Regulations 1990, reg. 2

For the appellants - P.K. Lim; M/s. P.K. Lim & Co.
For the respondent - Lucy Ho; M/s. Hiew & Chin

JUDGMENT

Mahadev Shankar JCA:

On 17 March 1988 Malayan Banking Bhd. ('the Bank') obtained judgment in Tawau High Court Civil Suit T 298 of 1986 against Hong Kim Sime ('Hong'), Goh Bun Kwee ('Goh') and Yee Pak Kui ('Yee') for RM265,887.41 interest thereon and costs ('the judgment debt').

The judgment debtors did not do anything to satisfy the judgment debt. The Bank therefore resorted to bankruptcy proceedings individually against each of the judgment debtors.

On 1 March 1993, the Bank issued a bankruptcy notice against Hong Kim Sime. It was registered as T (29) 39 of 1993, and personally served on Hong on 3 May 1993. He failed to comply and thereby committed an act of bankruptcy on 11 May 1993.

On 23 November 1993 the Bank took out a creditor's petition. It was registered as T (29) 140 of 1993. The branch manager of the Bank affirmed the truth of the statements in the petition in Tawau, Sabah before Chai Tat Min who is a Justice of the Peace in Sabah.

After the petition was served Hong filed a notice to oppose the petition. He claimed that the petition was a nullity on two grounds:

(1) that the Justice of the Peace was not authorised to administer the oath and there had been non-compliance with s. 128 of the Bankruptcy Act 1967; and

(2) that there had been a non-compliance with the Bankruptcy Rules 1969, r. 9 in that the number assigned by the Registry to the bankruptcy notice had not been assigned to the creditor's petition which was given a different number.

The Bank had simultaneously issued individual bankruptcy notices against Goh and Yee for the judgment debt. Apart from minor differences as to the respective dates of service of the notice and petition, the content and manner of affirmation of the documents were substantially the same. The same objections were taken by Goh and Yee, and all three were heard together by Ian Chin J, who gave a written judgment in open Court on 11 July 1994 dismissing the objection.

Hong, Goh and Yee each filed a notice of appeal on 15 July 1994, followed by a memorandum of appeal on 24 August 1994.

Meanwhile the Bank proceeded with the creditor's petition in the High Court. Before it was heard Hong, Goh and Yee on 15 August 1994 came to an agreement with the bank that they would settle the judgment debt by 15 December 1994 on condition that the Bank did not proceed with the creditor's petitions against each of them. The Bank accordingly submitted to the petitions being struck out by the High Court on 3 October 1993. After paying RM150,000 towards the judgment debt the judgment debtors failed to settle the balance by 15 December 1994.

In the face of these arrangements the judgment debtors proceeded with these appeals. On 19 December 1995 we dismissed them with costs and directed the deposit made to be paid out to the Bank towards its costs.

Ian Chin J has in his usual and erudite way covered the ground. We agree with what he has said.

The effect of reg. 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 is that in Sabah every Justice of the Peace "shall be authorised and is required to administer oaths under any written law ... as though he were a Second Class Magistrate." "Any written law" must in our view include the Bankruptcy Act 1967. The use of a different number was purely a formal defect and s. 131 of the Bankruptcy Act 1967, clearly provides that it should not invalidate the proceedings.

We need to add that these appeals were misconceived since the creditor's petitions had already been struck out in the Court below in compliance with a condition imposed by these appellants.

We directed that the same order made in Hong's appeal should also follow in the appeals of Goh and Yee and this judgment applies to all three appeals equally.

Reported by Gan Peng Chiang